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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-5617

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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STATE PUBLISHING CO HELENA, MONT

INDEX

	Page
TABLE OF CASES AND AUTHORITIES	ii
QUESTIONS PRESENTED	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF CASE	2
REASONS WHY WRIT SHOULD BE DENIED	4
I. THE PETITION FAILS TO IDENTIFY ANY CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN MONTANA'S 1973 DEATH PENALTY LAWS AND THE DEATH PENALTY PROVISIONS SUSTAINED IN GREGG JUREK AND PROFFITT, OR DEMONSTRATE ANY FAILURE OF THE TRIAL COURT TO FOLLOW MONTANA DEATH PENALTY SENTENCING PROCEDURES	5
II. PETITIONER HAS FAILED TO POINT OUT ANY EXTRAORDINARY CIRCUMSTANCES REQUIRING REVIEW OF THE MONTANA SUPREME COURT'S DEFINITION OF THE STATUTORY ELEMENTS OF THE CRIMES OF DELIBERATE HOMICIDE AND AGGRAVATED KIDNAPING AND HAS FURTHER FAILED TO POINT OUT ANY JURY INSTRUCTION WHICH RELIEVED THE PROSECUTION FROM PROVING AN ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT	12
III. PETITIONER FAILS TO SHOW AN ENFORCEABLE PLEA BARGAIN AGREEMENT	16
IV. PETITIONER'S SEARCH AND SEIZURE ARGUMENT PRESENTS TRITE LEGAL AND FACTUAL SEARCH AND SEIZURE ISSUES AND FAILS TO DEMONSTRATE THE EXISTENCE OF SIGNIFICANT FOURTH AMENDMENT ISSUES	18
CONCLUSION	23
CERTIFICATE OF SERVICE	24
APPENDIX	
Additional Statutes Involved	A-1
Petition and Motion in Mitigation	A-4
Amended Information	A-10
Affidavit of Barney Regan	A-14

STATE PUBLISHING CO HELENA MONT

TABLE OF CASES

	Page
American Communications Association v. Douds 339 U.S. 382 (1950)	23
Bethea v. United States, 365 A.2d 74 (D.C.App. 1976)	14
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	22
Cramer v. United States, 325 U.S. 1 (1945)	15
Davis v. United States, 160 U.S. 469 (1895)	14
Fisher v. United States, 328 U.S. 463 (1946)	13
Furman v. Georgia, 408 U.S. 238 (1972)	6
Gregg v. Georgia, 428 U.S. 153 (1976)	5-8
In Re Winship, 397 U.S. 358 (1970)	13
James v. United States, 416 F.2d 467 (5th Cir. 1969) cert. den. 397 U.S. 907 (1970)	21
Jurek v. Texas, 428 U.S. 267 (1976)	5,6, 7,9,10
Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 990 (1978)	6,10
McKenzie v. State of Montana, 433 U.S. 905 (1977)	
Morissette v. United States, 342 U.S. 246 (1952)	14
Mullaney v. Wilbur, 421 U.S. 684 (1975)	3,9,12,13
Patterson v. New York, 432 U.S. 242 (1977)	3,12,13
Pickering v. Board of Education, 391 U.S. 569 (1968)	16
Proffitt v. Florida, 428 U.S. 242 (1976),	5-8,10
Quigg v. Estelle, 492 F.2d 343 (9th Cir., 1974) cert. den. 419 U.S. 848 (1974)	21

STATE PUBLISHING CO HELENA MONT

TABLE OF CASES (Cont.)

Sauer v. United States, 241 F.2d 640 (9th Cir., 1957)	14
Santebello v. New York, 404 U.S. 267 (1971)	16
Spinelli v. United States, 393 U.S. 410 (1969)	19
State v. Coleman, 479 P.2d 732 (Mont. 1978)	5
State v. Fitzpatrick, 569 P.2d 373 (Mont. 1977)	5
State v. McKenzie (I), 559 P.2d 1023 (1976)	23
State v. McKenzie (II), 581 P.2d 1205 (1978)	passim
State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959)	21
Time, Inc. v. Firestone 428 U.S. 448 (1976)	16
United States v. Ross, 527 F.2d 984 (4th Cir. 1976) cert. den. 424 U.S. 945 (1976)	22
United States Sedillo, 496 F.2d 151 (9th Cir., 1974), cert. den. 419 U.S. 947 (1974)	22

OTHER AUTHORITIES

Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761 (1956)	14

STATUTES CITED

Montana Revised Codes, 1947	
Section 94-5-105	7
Section 94-5-304	8
Section 95-501	14
Section 95-502	3,4
Section 95-2201	2,9
Section 95-2203	2
Section 95-2204	2,9
Section 95-2501	2
Section 95-2502	2
Section 95-2503	2
Section 95-2508	2
Section 95-2601	2
Section 95-2602	2
Section 95-2603	2
Section 95-2604	2
Section 95-3214	12

STATE PUBLISHING CO HELENA MONT

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978
No. 78-5617

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

Respondent, State of Montana, respectfully requests that this Court deny the petition for writ of certiorari.

Respondent accepts petitioner's citation of the opinion below, the jurisdictional statement, and the statement as to the manner in which the questions were raised below.

QUESTIONS PRESENTED

Respondent respectfully disagrees with petitioner's statement of questions 2 and 3. Those questions, as phrased, ignore important factual and legal predicates which were resolved adversely to petitioner by the Montana courts. Respondent has rephrased 2 and 3 as follows:

2. Whether the Montana Supreme Court's holdings that (1) the prosecution was not relieved from proving an element of the offenses charged beyond a reasonable doubt and that (2) the lack of mental disease or defect and the concurrent mental capacity to act with conscious purpose or knowledge are not elements of either the crime of deliberate homicide or aggravated kidnaping under Montana law, are so extra-

STATE PUBLISHING CO HELENA MONT

ordinary or incredible as to require this Court to reinterpret Montana deliberate homicide and aggravated kidnapping statutes.

3. Whether there was a valid and enforceable plea bargain agreement between petitioner and the State of Montana.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has ignored and omitted important sections of the Montana Revised Codes Annotated, specifically Sections 95-2201, 95-2203, 95-2204, 95-2501, 95-2502, 95-2503, 95-2508, 95-2601, 95-2602, 95-2603, and 95-2604, Mont. Rev. Codes Ann. The omitted sections are set forth in an appendix to this brief, infra, pp. A-1 through A-4.

STATEMENT OF CASE

Petitioner was convicted of the kidnapping, rape, and torture-murder of a young woman. His crimes were brutal and vicious.[1]

Petitioner's death sentence and convictions of aggravated kidnapping and deliberate homicide were affirmed by the Montana Supreme Court in 1976. State v. McKenzie (I), 557 P.2d 1023 (1976). The 1976 decision was followed by a first petition for writ of certiorari, setting forth five issues for review. One of those issues concerned

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[1] The victim, a rural school teacher, was reported missing January 22, 1974. Her body was discovered January 23, 1974, clothed only in a shirt, sweater and bra. She had been savagely beaten, the death blow laying open the right side of her head. (Tr. 560-571, 577-579, 1397.) A rope had been used to garrotte her a half hour prior to her death and she would have died of strangulation had not the rope been released. (Tr. 553, 585-594, 717-719.) She had been raped. (See Tr. 601-64, 607, 613.) The evidence connecting defendant to the crimes is extensively stated in the opinions below.

STATE PUBLISHING CO HELENA MONT

allocation to petitioner of the burden of proving a diminished capacity defense.[2] Petitioner, citing Mullaney v. Wilbur, 421 U.S. 684 (1974), alleged that the state had been thereby relieved of its burden of proving the "mental element" of the crimes charged beyond a reasonable doubt.[3] While the petition was pending, this Court decided Patterson v. New York, 432 U.S. 197 (1977). Following Patterson the Court granted certiorari in this case, vacated the judgment and remanded to the Montana Supreme Court for further consideration in light of Patterson. McKenzie v. State of Montana, 433 U.S. 905 (1977).

Upon remand, the Montana Supreme Court reviewed not only those issues touched by Patterson but reconsidered all issues which had been raised by petitioner in his first appeal. It again affirmed.[4] State v. McKenzie (II), 581 P.2d 1205 (1978).

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[2] "Diminished capacity" is a convenient, shorthand term employed by the Montana Supreme Court to refer to a defense under Section 95-502, Mont. Rev. Codes Ann. Section 95-502 provides:

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense.

[3] Petitioner also challenged the allocation of the burden of proof with respect to a legal insanity defense. Petitioner has not renewed this contention in the second petition.

[4] Like McKenzie (I), there was a single dissent in McKenzie (II). In McKenzie (I), District Judge Robert Boyd, sitting by designation, dissented with respect to the admission of photographic evidence. In McKenzie (II), Justice Shea, who was not a member of the Court at the time of the first McKenzie decision, dissented with regard to search and seizure and death penalty issues. The dissent includes a passionate, personal attack upon the majority of the Court, accusing the majority of deceiving the reader and asserting that a first year law student would recognize legal distinctions the majority failed to perceive. 581 P.2d at 1235, 1244.

STATE PUBLISHING CO HELENA MONT

In McKenzie (II), the Montana Supreme Court considered Patterson, but determined as a matter of statutory construction of Montana's criminal code that a defendant's mental capacity and sanity are not elements of any of the crimes charged against petitioner. It held that diminished mental capacity under Section 95-502, Mont. Rev. Codes Ann., is an affirmative defense which must be proved by a defendant by a preponderance of evidence. 581 P.2d at 1232-1234. The Court further concluded, as a factual matter, that the jury instructions given in petitioner's case were more lenient than provided by statute. It construed the instructions as requiring petitioner to raise only a "reasonable doubt" with respect to his diminished capacity defense. 581 P.2d at 1234-1235. Finally, the Court declared that it was convinced beyond a reasonable doubt that petitioner had acted purposely and knowingly. 581 P.2d at 1224.

This second petition follows. Petitioner renews the claims made in his first petition with one exception - he has deleted a challenge to the allocation of the burden of proof with respect to a legal insanity defense.

REASONS WHY THE WRIT SHOULD BE DENIED

The respondent respectfully requests that this Court deny certiorari because the decision below turns upon its own, unique set of facts and the petition fails to present important constitutional issues. As will more specifically appear, much of the petitioner's argument is little more than an attempt to controvert factual questions resolved against him by the trial court and the Montana Supreme Court. He requests in essence, that this Court review and readjudicate, in his favor, necessary factual predicates to

his constitutional challenges. Other parts of petitioner's argument are in the nature of requests that this Court reconsider well settled areas of constitutional law; impose federal uniformity in areas of criminal procedure which have repeatedly and consistently been reserved to the States; and take upon itself the business of interpreting State statutes. The petitioner fails to demonstrate any conflict or significant difference between the decision below and the decisions of this Court.

I. THE PETITION FAILS TO IDENTIFY ANY CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN MONTANA'S 1973 DEATH PENALTY LAWS AND THE DEATH PENALTY PROVISIONS SUSTAINED IN GREGG, JUREK AND PROFITT, OR DEMONSTRATE ANY FAILURE OF THE TRIAL COURT TO FOLLOW MONTANA DEATH PENALTY SENTENCING PROCEDURES.

Petitioner prefaces his argument in support of his request that this Court review Montana's post-Furman 1973 death penalty statutes by a declaration that this case involves the only death sentence imposed under the 1973 statutes.[5] The statement is misleading. Since 1973 the death penalty has been pronounced five times in Montana.[6]

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[5] Petition for Writ of Certiorari, p. 18.

[6] Bernard Fitzpatrick, Gary Radi, Dewey Coleman and Robert Close, in addition to petitioner, have been sentenced to death since 1973. Fitzpatrick's and Radi's convictions were reversed for procedural errors in State v. Fitzpatrick, 569 P.2d 373 (Mont. 1977). Upon remand, Radi was acquitted. Fitzpatrick was reconvicted and the death penalty was again imposed; a second appeal is presently pending in the Montana Supreme Court, State v. Fitzpatrick, Docket No. 14422. Coleman's conviction was affirmed in State v. Coleman, 579 P.2d 732 (Mont. 1978), but his death sentence was vacated. Coleman was sentenced under the 1974 amendments to Montana death penalty statutes; those amendments made the death penalty mandatory for aggravating kidnapping resulting in the death of the victim. The Court declared the mandatory feature unconstitutional and remanded for resentencing. After remand, Coleman was again sentenced to death under Montana's 1977 death penalty amendments. Those amendments require consideration of mitigating circumstances in all capital cases. A second appeal is now pending in the Montana Supreme Court. State v. Coleman, Docket No. 14448. Finally, Robert Close has appealed his death sentence, State

While the other four defendants were sentenced after petitioner, and after the 1974 amendments to death penalty provisions,[7] the death penalty has been imposed in approximately on case each year. Thus, there is little significance in the fact that petitioner was the only defendant sentenced for a crime committed in the one year interval between enactment of the 1973 statute and its first amendment.

1. In the first part of his death penalty argument, petitioner attacks aggravating and mitigating circumstance provisions of the 1973 death penalty statute. Certainly these provisions differ in some respects from those which were approved in Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); and Proffitt v. Florida, 428 U.S. 242 (1976). But the holdings of those cases and Furman v. Georgia, 408 U.S. 238 (1972) do not require death penalty statutes of other states to parrot every detail and procedure of Georgia, Texas and Florida death penalty statutes in order to pass constitutional muster. "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death." Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 990 (1978). Significantly, even the approved Georgia, Texas and Florida death

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6 (cont) v. Close, Montana Supreme Court Docket No. 13522, but further proceedings have been stayed pending action of the Governor upon his application for commutation of sentence.

7 The 1974 amendments, 1977 Montana Laws, ch.'s 126 and 262, deleted provision for consideration of mitigating circumstances in connection with sentencing for aggravated kidnaping resulting in the death of the victim and made the death penalty mandatory upon conviction of deliberate homicide resulting in the death of a peace officer.

penalty statutes differed from one another in many respects.[8] What the statutes all shared in common was the requirement that the death penalty be imposed upon a finding of one of a limited number of specific aggravating circumstances; a requirement that specified mitigating circumstances be considered in determining whether to impose the death penalty; and provision for judicial review of death sentences. The 1973 Montana death penalty statutes share those same features. McKenzie (II), 581 P.2d at 1228-1229.

Petitioner's assertion that the 1973 Montana statutes merely "papered over" unguided and unchecked discretion of prior death penalty procedures by making "a mandatory death penalty the presumptive sentence for a broad roster of criminal offenses,"[9] collides head on with the decisions in Jurek and Proffitt. In Gregg, a similar contention was made that the changes in Georgia's death penalty provisions were merely "cosmetic" and that enumerated aggravating circumstances were so broad and vague that the death sentence could be imposed upon virtually any first degree murder conviction. 428 U.S. at 198-200. The 1973 Montana death penalty statutes provide for only six aggravating circumstances.[10] In comparison, Georgia statutes provide ten,

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8 The Florida statutes delegated the final sentencing decision to the trial judge, while those of Georgia and Texas delegated it to the jury; the Texas statutes provided for a finding of aggravating circumstances in conjunction with the jury's determination of guilty, while those of Georgia and Texas reserved determination of the existence of an aggravating circumstance until a separate sentencing proceeding; and all three statutes differed as to the specifics of appeallate review and the enumerated aggravating and mitigating circumstances.

9 Petition for Writ of Certiorari, p. 21.

10 Section 94-5-105, Mont. Rev. Codes Ann. (1974 supp.) provided:

Sentence of death for deliberate homicide. (1) When a defendant is convicted of the offense of deliberate homicide the courts shall impose a sentence of death in

and Florida statutes eight, aggravating circumstances. Significantly, the two aggravating circumstances found to exist in the present case - deliberate homicide by means of torture and aggravated kidnapping resulting in the death of the victim - both have counterparts in Georgia and Florida aggravating circumstance provisions.[11]

Arguments made by petitioner concerning provision for mitigating circumstances are no more than a dispute over matters of statutory construction of state law. The

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10 (cont)

the following circumstances, unless there are mitigating circumstances:
(a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
(b) the defendant was previously convicted of another deliberate homicide; or
(c) The deliberate homicide was committed by means of torture; or
(d) The deliberate homicide was committed by means of torture; or
(e) the deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

Section 94-5-304, Mont. Rev. Codes Ann. (1974 supp.) provided:

Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct, unless there are mitigating circumstances.

11 See, Gregg, supra, 428 U.S. at 165 (n.9) and Proffitt, supra, 428 U.S. at 248 (n.6). The death of the victim as aggravating circumstance for kidnaping under the Montana law corresponds to the felony-murder provision of subsecton (d) of Florida aggravating circumstances and subsection (b)(2) of Georgia aggravating circumstances. Torture as an aggravating circumstance is similar to a subsecton (h) aggravating circumstance under Florida's statute, which provides, "(h) the capitol felony was especially heinous, atrocious or cruel," and subsection (b)(7) of the Georgia statute, which provides, "(7) the offense of murder, rape, armed robbery or kidnaping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated batter to the victim."

STATE PUBLISHING CO HELENA MONT

Montana Supreme Court determined that death penalty provisions cannot be read in isolation of other sentencing provisions. It held, specifically, that the provisions for consideration of mitigating circumstances must be read together with Sections 95-2201 and 95-2204, Mont. Rev. Codes Ann. Section 95-2204 requires preparation of a presentence report specifying the circumstances of the offense and the individual characteristics of the defendant.[12] Section 95-2201 requires the sentencer to consider the individual characteristics of a defendant in pronouncing sentence. Finally, individualized sentencing requires a sentencing hearing at which a defendant is entitled to present testimony and evidence in mitigation of punishment. 581 P.2d at 1229.

In construing death penalty and sentencing statutes, the Montana Supreme Court did no more than the Texas Supreme Court did in Jurek when it broadly construed Texas provisions for mitigating circumstances.[13] Petitioner has failed to demonstrate any extreme or compelling circumstances justifying abrogation of the rule that "state courts are the ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684, 690-691 (1975). Moreover, he ignores the fact that Texas death penalty statutes approved in Jurek

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12 Section 95-2204 provides:
Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court.

13 See, Jurek, supra, 428 U.S. at 269-274.

STATE PUBLISHING CO HELENA MONT

did not "explicitly speak of mitigating circumstances" but provided for the jury to answer only three questions. The statutory location, label, and language of provisions for mitigating circumstances is not constitutionally critical. What is significant is that the procedures, as interpreted and applied, provide for the broadest possible consideration of the circumstances of the crime and the individual characteristics of the defendant. Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 990 (1978), and see Jurek, supra, 428 U.S. at 269-274. Montana's provisions are broad enough to permit consideration of "any aspect of the defendant's character or record and any of the circumstances of the offense," Lockett, supra, 57 L.Ed. at 990, and the petitioner herein was afforded an unrestricted opportunity to present evidence rebutting any matter in his pre-sentence report and any new matter in mitigation of sentence.[14]

2. Petitioner's attack upon the lack of jury participation in capital punishment cases has no precedential support. While this Court has approved the practice of jury participation in sentencing decisions, it has "never suggested that jury sentencing is constitutionally required," Profitt, supra, 428 U.S. at 252. Judicial sentencing in capital cases was expressly sustained in Proffitt. Moreover, petitioner's argument for jury determination in the sentencing decision is, in part, specious. With respect to the determination of aggravating circumstances, this petitioner received the exact treatment he demands; the issue of aggravating circumstances was

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[14] Petitioner declined to present evidence (Tr. 2611-2612) and relied upon a "Petition and Motion in Mitigation," a copy of which is set forth in an appendix hereto at pp. A-5 through A-9.

STATE PUBLISHING CO HELENA, MONT

submitted to the jury, which found beyond a reasonable doubt that two aggravating circumstances existed.

3. Petitioner's assertion that his death sentence was based upon two erroneous factual predicates is meritless.

His argument concerning the trial court's use of the word "rape" in its sentencing decision is an effontry to common sense. In its sentencing order, the trial court referred to "the brutal, consciousless, torture, rape, and deliberate killing of a human being." (Emphasis added.) That statement cannot be ripped from the context of the case. Petitioner was charged and tried on a seven count information involving a single abduction and murder.[15] Count five charged petitioner with rape, but was never reached by the jury since the jury was specifically instructed to disregard any remaining counts of the information if it found petitioner guilty of deliberate homicide and aggravated kidnaping. (Tr. 2592, 2595-2596.) However, petitioner was convicted on count two, which charged him with deliberate homicide while engaged in the commission or attempt to commit the crime of "sexual intercourse without consent" or "aggravated assault".[16] He was additionally convicted on count three, which charged him with the aggravated kidnaping of Lana Harding for the purpose of committing the crime of "sexual intercourse without consent" or the crime of "aggravated assault". A review of the evidence

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[15] A copy of the information is reproduced in the appendix hereto at pp. A-10 through A-13.

[16] The element of "torture" of the deliberate homicide charge required a finding that the petitioner inflicted cruel suffering upon the victim for the purpose of extorting something from the victim, pursuading the victim against her will, or satisfying some untoward propensity of the petitioner. (Preliminary Instruction 23, Ct. File Item 154.)

STATE PUBLISHING CO HELENA, MONT

at trial demonstrates the impossibility of separating the rape element from the assault.[17] Finally, in the same sentencing order, the court specifically and correctly listed the offenses of which petitioner had been convicted.

Contrary to petitioner's assertion concerning a second erroneous factual predicate, the trial court's statement as to the time of petitioner's parole eligibility if sentenced to one hundred years imprisonment was a correct statement of the law. Section 95-3214, Mont. Rev. Codes Ann. (1974 Supp.) provided in relevant part:

> 1. That no convict serving a time sentence shall be paroled until he shall have served at least one-quarter (1/4) of his full term, less good time allowances off, as provided in section 80-740; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half (12 1/2) years; *** (Emphasis supplied.)

II. PETITIONER HAS FAILED TO POINT OUT ANY EXTRAORDINARY CIRCUMSTANCES REQUIRING REVIEW OF THE MONTANA SUPREME COURT'S DEFINITION OF THE STATUTORY ELEMENTS OF THE CRIMES OF DELIBERATE HOMICIDE AND AGGRAVATED KIDNAPING AND HAS FURTHER FAILED TO POINT OUT ANY JURY INSTRUCTION WHICH RELIEVED THE PROSECUTION FROM PROVING AN ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT

Petitioner's Mullaney and Patterson claims proceed happily along upon an assumption that mental capacity and sanity are elements of the crimes of deliberate homicide and aggravated kidnaping under Montana law, and upon a further assumption that trial instructions had the effect of telling

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17 The victim was found partially clothed, with semen on her body and in her vagina and a lacertaion adjacent to the vaginal orifice. (Tr. 601-604, 607-613.) A few days prior to the murder, petitioner purchased a new (used) truck and on the day prior to the discovery of the victim's body petitioner told a fellow worker that he broke in every new vehicle by having sexual intercourse in it. (Tr. 2085, 1752-1753.) Petitioner also had boasted that he had intercourse with country school teachers because they were naive and easy to get, and he could "teach them." (Tr. 2054 -2056).

STATE PUBLISHING CO HELENA MONT

the jury to presume that he acted purposely and knowingly. These assumptions are essential to a colorable claim on his behalf. However, the foundations for both were shattered by the Montana Supreme Court's decision in McKenzie (II).

Respondent has no doubt that Patterson, Mullaney and In re Winship, 397 U.S. 358 (1970), require the prosecution to prove every element of a criminal offense beyond a reasonable doubt. The question is, what are the elements of a given criminal offense? In the present case, the Montana Supreme Court has definitively interpreted the Montana criminal code and held that the absence of insanity or a lack of mental capacity, are not elements of either deliberate homicide or aggravated kidnaping. It declared that diminished mental capacity is an affirmative defense, the non-existence of which does not have to be proved by the prosecution.

Petitioner, in effect, requests this Court to reject Montana's interpretation of its own criminal statutes, something this Court expressly refused to do even in Mullaney.[18] Such reinterpretation would upend deeply rooted legal concepts of "mens rea" and criminal responsibility.[19]

"Mens rea", which appears in Montana deliberate homicide and aggravated kidnapping statutes in the form of

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18 "This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, see, e.g., Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875); Winters v. New York, 333 US 507, 92 L Ed 840, 68 S Ct 665 (1948), and that we are bound by their constructions except in extreme circumstances not present here. Accordingly, we accept as binding the Main Supreme Judicial Court's construction of state homicide law." (Footnotes omitted.) Mullaney, supra, 421 U.S. at 691.

19 It would also have the effect of overruling Fisher v. United States, 328 U.S. 463 (1946) which sustained a trial court's refusal to instruct a jury that it should consider evidence of diminished capacity.

STATE PUBLISHING CO HELENA MONT

"purposely or knowingly", is a legal fiction for effecting society's allocation of criminal and moral accountablity. Bethea v. United States, 365 A.2d 64, 87 (D.C. App. 1976). "Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible." Sauer v. United States, supra, 241 F.2d 640, 648 (9th Cir. 1957); and see also Davis v. United States, 160 U.S. 469, 486 (1895); Morissette v. United States, 342 U.S. 246, 250 (1952); and see also Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761 (1956).

Moreover, the jury instructions in this case do not even raise the issues described by petitioner. The jury was not instructed that petitioner bore the burden of proof of a diminished capacity defense, nor was it instructed to presume that petitioner acted purposely and knowingly.

The jury instruction burdening petitioner with establishing an insanity defense related solely to a legal insanity defense excluding criminal responsibility.[20] No similar burden of proof instruction was given with respect to a diminished capacity defense and the Montana Supreme

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[20] A legal insanity defense is one arising under Section 95-501, Mont. Rev. Codes Ann., which provides:

Mental disease or defect excluding responsibility.

(a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) As used in this chapter, the terms "mental disease or defect" does not include an abnormality manifested only by re-repeated criminal or otherwise antisocial conduct. (sic)

The diminished capacity defense arises under a separate provision, Section 95-502, Mont. Rev. Codes. Ann. See n. 2, supra.

STATE PUBLISHING CO HELENA MONT

Court expressly found that the instructions as a whole only required petitioner to raise only a "reasonable doubt" as to whether he suffered from mental disease or defect which prevented him from having a purposeful or knowing state of mind with respect to the offenses charged. McKenzie (II), 581 P.2d at 1235.

Petitioner's interpretations of jury instructions regarding proof of his mental state do not accord with those of the Montana Supreme Court, nor with the plain and unequivocal language of the instructions. Mental state instructions were given as Added Instructions 30 through 38, Ct. File Item 154, which are reproduced as Appendix C to the Petition for Writ of Certiorari. A defendant's mental state can never be proved directly; it is proved through inferences and conclusions drawn by the jury from a defendant's overt conduct or acts. Cramer v. United States, 325 U.S. 1, 31 (1945). The instructions in this case did no more than educate the jury as to the manner in which it was to draw inferences and conclusions. One instruction to which petitioner objects states that a person is presumed to intend the ordinary consequences of his voluntary acts. A similar instruction was approved in Cramer v. United States, supra, 325 U.S. at 31, and was triggered only if the jury first found that the acts were committed voluntarily. Ultimately, petitioner's arguments concerning the use of presumptions are simply irrelevent. Petitioner was convicted of aggravated kidnaping and deliberate homicide by means of torture. Conviction for each crime required a finding of a specific intent or specific purpose, and the jury was emphatically instructed that to find a particular purpose, it could not employ any presumptions:

STATE PUBLISHING CO HELENA MONT

> In offenses which require proof of a particular purpose the purpose required may never be proved by means of legal presumptions, but must be proved by means of inferences only. In this case the offenses of: Deliberate Homicide By Means of Torture and Aggravated Kidnaping - all require proof that the defendant committed the particular act charged for a particular purpose, in addition to proof that he committed said act either knowingly or purposely.

Add. Instruction 32, Ct. File Item 154. This instruction was repeated and reemphasized in later instructions dealing with proof of aggravated kidnaping, Add. Instruction 36, and deliberate homicide by means of torture, Add. Instruction 34.

III. PETITIONER FAILS TO SHOW AN ENFORCEABLE PLEA BARGAIN AGREEMENT

Citing Santobello v. New York, 404 U.S. 267 (1971), petitioner requests this Court to review and enforce a proported plea bargain agreement.[21] The Montana Supreme Court, reviewing the record of the trial court, determined that there was never a plea bargain agreement which could be enforced. McKenzie (II), 581 P.2d at 1214. That finding, although not binding on this Court, is entitled to great weight. Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976); Pickering v. Board of Education, 391 U.S. 563, 578 (n.2) (1968)(Douglas, J., concurring).

Santobello held that when a defendant enters a plea of guilty in exchange for an agreement by the prosecutor to make a particular sentencing recommendation, the prosecutor's promise must be enforced or the defendant allowed to withdraw his guilty plea. The reasons for enforcing a plea

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[21] Petitioner's argument illustrates the sometimes schizophrenic nature of criminal appeals. While petitioner maintains his innocence in requesting reversal of his conviction, he requests a confession of guilt be accepted.

bargain agreement are apparent. The defendant, by pleading guilty, gives up important constitutional rights, including the right to trial by jury; the right to be confronted by witnesses; and the right against self-incrimination. Petitioner never waived these rights. At most, his attorney made vague and unspecified disclosures concerning trial strategy in an attempt to clinch a tenative plea bargain agreement.

Petitioner's version of the plea bargaining powers is set forth in his attorney's affidavit dated December 30, 1974 (Ct. File Item 99), a copy of which is set forth in an appendix attached hereto at pp. A-14 through A-19. The information allegedly disclosed by defense counsel to prosecutors is set forth in the most general and self-serving terms:

> Subsequent to this meeting with the court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influence of public opinion by the Sheriff of Pondera County, (sic) your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreements heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury and where certain assumptions being made by the Sheriff and Prosecution were fallacious. *** (Page 4.) (Emphasis supplied.)

Nowhere does petitioner explain how such disclosure, whatever it was, interfered with his defense or gave the prosecution an unfair advantage. He did not waive any right to object to admission of evidence based on ineptitude in the investigation; how the prosecutor could have avoided such objections is a matter of speculation. The affidavit of

petitioner's counsel reveals that plea bargaining was initiated by defense counsel, who suggested the possibility of a plea almost a year after petitioner's arrest. Even after suggesting the possibility of a plea for a second time, the prosecutor "left your affiant with the impression that he either did not appreciate the nature of your affiant's effort or that he would have to secure the advice of the Special Prosecutor ***." (Affidavit, p.1.) The affidavit contains conclusory statements of defense counsel's "understanding" that a "final and complete bargain" had been struck, but no evidence is offered to show that the prosecutor committed himself to any agreement. Petitioner's own evidence shows no more than defense counsel's voluntary disclosure of vague information concerning trial strategy in an effort to "nail down" a favorable plea arrangement for his client.

IV. PETITIONER'S SEARCH AND SEIZURE ARGUMENT PRESENTS TRITE LEGAL AND FACTUAL SEARCH AND SEIZURE ISSUES AND FAILS TO DEMONSTRATE THE EXISTENCE OF SIGNIFICANT FOURTH AMENDMENT ISSUES.

Respondent agrees with petitioner's prefatory characterization of his search and seizure arguments as "recurrent." Every search and seizure presents a question of "probable cause",[22] one of the grounds alleged for review, and the authority of law enforcement officers to seize

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[22] Petitioner's characterization of the probable cause issue is misleading. He states the issue as being "the circumstances under which probable cause to arrest may furnish probable cause to search a dwelling ***." Petition, p. 53 (Emphasis added.) A search warrant for the dwelling in question was issued, a copy of which is reproduced in the dissenting opinion in McKenzie (II), 581 P.2d at 1241. The search was not justified as incidental to arrest.

particular items is always at issue where an item seized is not exactly described in a warrant.

Petitioner's probable cause arguments are based upon his placid but erroneous assumption that the facts which support a finding of probable cause to arrest cannot, without more, support a probable cause finding for a search warrant. Nonsense! In some cases the facts may support a finding of probable cause to arrest only, but in others those same facts may support a probable cause finding for both arrest and a search warrant. There is no significance whatsoever in the fact that the same facts supported both petitioner's arrest and a warrant to search his house and truck.

Probable cause determinations are not made on technicalities and "issuing magistrates are not to be confined by niggardly limitations or by restrictions on their use of common sense." Spinelli v. United States, 393 U.S. 410, 419 (1969). An application of common sense to the facts presented to the justice of the peace in this case,[23] overwhelmingly supports findings of (1) probable cause to believe that the victim, Lana Harding, had been assaulted and abducted; (2) probable cause to believe that the petitioner was connected with that assault and abduction; (3) probable cause to believe that petitioner's pickup truck had been used in connection with the assault and abduction; and (4) probable cause to believe that items of petitioner's or victim's clothing were to be found in petitioner's house. The victim, Lana Hardin, was missing. There was evidence of

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[23] The facts supporting the issuance of the search warrant are recited in the majority opinion in McKenzie (II), 581 P.2d at 1212. A copy of the affidavit supporting the application for the search warrant is reproduced in the dissenting opinion, 581 P.2d at 1240.

a struggle inside her teacherage, and a drag trail and tennis shoe were discovered outside the teacherage. Blood stains and a woman's watch were discovered in the same area where petitioner and his pickup truck were observed the evening of the abduction. Petitioner was observed at that time in a highly nervous, excited and out of breath condition. He solicited help in starting his truck, which was parked one hundred feet from where the watch and blood stains were discovered, and indicated that he was going home.

The clothes worn by petitioner the evening of the abduction were obvious evidence in a criminal investigation. The abduction had taken place under circumstances indicating violence and struggle. The clothes worn by the assailant could be expected to have the victim's hair, tissue or blood on them. The petitioner, who lived nearby, would likely have worn those clothes home.[24]

The second aspect of the search and seizure issue advanced by petitioner is that the search of the petitioner's house was a "general" search based upon a "general warrant."

Petitioner's attack on the warrant is based upon the language authorizing the search and seizure of "any other

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[24] In his dissent, Justice Shea asserts that here was no evidence supporting a finding of probable cause that the victim's clothing would be found at either petitioner's home or in his pickup.

> In this case no evidence was present as to the probability of the clothing being at the home or in the pickup truck. Moreover, logically speaking, it would be highly improbable that her clothing would be there. The probability would be that a defendant would have destroyed them or disposed of them in a place less likely to implicate the defendant. (Emphasis added.)

581 P.2d at 1261. The dissent assumes that every criminal acts rationally and logically and destroys or covers up all the evidence related to his crimes. If the observation is correct, then no search warrant could ever issue as there would be no evidence to discover. The assertion also overlooks the petitioner's clothing as evidence.

contraband articles." That language appeared after an enumeration of specific articles of clothing of the victim and petitioner for which search was authorized. A warrant is not destroyed by the use of the phrase "and any other contraband articles," as contended by petitioner. The warrant here did not authorize a general exploratory search. The test of the warrant is whether the place to be searched and the items to be seized are as precisely identified in the warrant as the nature of the activity permitted, and when an exact description of instrumentalities is made impossible by the circumstances, reference to a generic class of the items to be seized is sufficient. James v. United States, 416 F.2d 467 (5th Cir., 1969), cert. den. 397 U.S. 907 (1970). The phrase "any other contraband" is similar to the phrase "any other evidence," use of which has been sustained, and is not an authorization for a general search. Quigg v. Estelle, 492 F.2d 343 (9th Cir., 1974), cert. den. 419 U.S. 848 (1974). As Quigg points out, such a phrase is merely a codification of the authority to seize certain items under the "plain view doctrine."

Petitioner takes issue with the seizure of two items of clothing, a pair of Red Wing boots and a plaid jacket, which were not specifically enumerated in the warrant.[25] Petitioner ignores the plain view doctrine as it applies to the facts of the search. Under the plain view doctrine,

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[25] In footnote 75 of his petition, petitioner states that the boots were one of the most damaging items of evidence against petitioner since their soles matched the boot imprints found inside a pair of overshoes on which the victim's blood and brain tissue were found. Respondent wonders how petitioner would describe the effect of other evidence introduced at trial, such as the exhaust manifold seized from the back of his truck and which had the victim's blood and cortical tissue on it, and was identified as being the weapon which could have inflicted the death blow.

evidence may be seized if (1) the initial intrusion of the police was justified by a valid search warrant; (2) the discovery of the unlisted items was inadvertent (the police did not have prior knowledge of and prior intent to seize those items not described in the warrant, nor does the petitioner argue that such was the case); and (3) the evidence seized was of an incriminating nature. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In the present case, the officer who executed the warrant testified that the Red Wing boots were seized because their tread design was similar to tracks observed outside the teacherage, and that the clothing seized was basically that which an individual observed petitioner wearing on the night of the homicide. The items were incriminating objects, for which officers had probable cause to believe were evidence of a crime. United States v. Ross, 527 F.2d 984 (4th Cir, 1976), cert. den. 424 U.S. 945 (1976); United States v. Sedillo, 496 F.2d 151 (9th Cir, 1974), cert. den. 419 U.S. 947 (1974).

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CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 22nd day of November 1978.

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

MIKE McCARTER
Assistant Attorney General

STATE PUBLISHING CO HELENA MONT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5617

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

CERTIFICATE OF SERVICE

I, MICHAEL T. GREELY, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to Certiorari in the above case on counsel for the petitioner by depositing same in the United States mail, first class mail, postage prepaid, addressed as follows:

BARNEY REAGAN
Post Office Box 342
Cut Bank, Montana 59427

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ANTHONY G. ARMSTERDAM
Stanford University Law School
Stanford, California 94305

DATED this 22d day of November 1978.

MICHAEL T. GREELY
Attorney General
State of Montana
Attorney for Respondent

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 95-2201, Mont. Rev. Codes Ann.

> "This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

Section 95-2203, Mont. Rev. Codes Ann.

> "No defendant convicted of a crime which may result in commitment for one (1) year or more in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense."

Section 95-2204, Mont. Rev. Codes Ann.

> "Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court."

Section 95-2501, Mont. Rev. Codes Ann.

> "The chief justice of the supreme court of Montana shall appoint three (3) district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court.

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This review division shall meet at least four (4) times a year or more as its business requires as determined by the chairman. The decision of any two (2) of such judges shall be sufficient to determine any matter before the review division. No judge shall sit or act on a review of sentence imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the chief justice of the supreme court of Montana may designate another judge to act in place of such judge. The review division shall hold its meetings at Deer Lodge, and may adopt any rules and regulations which will expedite their review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation."

Section 95-2502, Mont. Rev. Codes Ann.

"Any person sentenced to a term of one (1) year or more in the state prison by any court of competent jurisdiction may, within sixty (60) days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered, an application for review of the sentence by the review division. Upon imposition of the sentence the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the sentence within limits fixed by law. The clerk shall transmit such application to the review division and shall notify the judge who imposed the sentence, and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven (7) days, if requested to do so by the review division. The review division may for cause shown consider any late request for review of sentence and may grant such request. The filing of an application for review shall not stay the execution of the sentence."

Section 95-2503, Mont. Rev. Codes Ann.

The review division shall, in each case in which an application for review is filed in accordance with 95-2502, review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time, and may order such different sentence or sentences to be imposed as could have been imposed at the time of imposition of the sentence under review, or may decide that the sentence under review should stand. In reviewing any judgment, said division may require the production of presentence reports, and any other records, documents, or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed. If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted. The decision of the review division in each case shall be final and the reasons for such decision shall be stated therein. The original of each decision shall be sent to the clerk of the court for the county in which the judgment was rendered and a copy shall be sent to the judge who imposed the sentence reviewed, the person sentenced, the principal officer of the institution in which he is confined and the decision shall be reported in the Montana Reports."

Section 95-2601, Mont. Rev. Codes Ann.

"Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence."

Section 95-2602, Mont. Rev. Codes Ann.

> "The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place or the clerk of the supreme court a verified petition. The clerk shall docket the petition upon its receipt and bring the same promptly to the attention of the court."

Section 95-2603, Mont. Rev. Codes Ann.

> "The petition shall identify the proceeding in which the petitioner was convicted, give date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. They shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Arguments and citations and discussion of authorities shall be omitted from this petition."

Section 95-2604, Mont. Rev. Codes Ann.

> "A motion for such relief may be made at any time after conviction."

Section 95-2608, Mont. Rev. Codes Ann.

> "Either the petitioner or the state may appeal to the supreme court of Montana from an order entered on the motion. The appeal shall be taken within six (6) months from the entry of the order."

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

THE STATE OF MONTANA, Plaintiff, -vs- DUNCAN PEDER McKENZIE, JR., Defendant.	Criminal Action No. 6593A PETITION AND MOTION IN MITIGATION

COMES NOW, the Defendant, and petitions and moves the Court to find and grant mitigation as follows:

1. That the Defendant was found guilty by the verdic of a jury on February 1, 1975, of the offenses of Deliberate Homicide and Aggravated Kidnapping; that upon both verdicts special interrogatories asked of the jury and were answered in the affirmative establishing a jury determination that the Deli berate Homicide was committed by means of torture and that the Aggravated Kidnapping resulted in death of the victim;

2. That both such verdicts may carry a purported man- datory penalty of death "unless there are mitigating circumstanc (the phrase quoted above is no longer found in the statute [94-5-304 M.C.C. 1973] covering aggravated kidnapping as the sam was deleted in Section I of Chapter 126 of the Laws of 1974 whic became effective March 11, 1974 which was 48 days after the e- vents allegedly took place which form the basis for offenses charged in this cause).

3. That Defendant contends and asserts that the phrase, "unless there are mitigating circumstances", renders both statutes (94-5-105 and 94-5-304 M.C.C. 1973) unconstitution as being violative of the rule expressed in Furman v. Georgia, 408 U.S. 238 (1973) as such provision allows discretion in the

162

determination as to what are and whether there are any "mitigating circumstances".

4. That both verdicts returned by the jury in this case are not general verdicts as required by statute to be returned by juries in criminal matters, but are either (a) a special verdict not authorized or permitted to be returned by a jury in a criminal matter or (b) a general verdict qualified by a special interrogatory not authorized or permitted by statute; that in either event, the verdict is contrary to both law and the evidence submitted or heard in this matter and the portion thereof containing this special interrogatory or special verdict should be disregarded by the Court as any legal or binding return by the jury, the jury being without power to so find, and the matter therein contained being matter for the Court's determination only. Upon sentencing, the Court should not feel bound to find in compliance with the answers given by the jury to the special interrogatories and such answers being contrary to the law and the evidence the Court should disregard the same in sentencing.

5. That the Court should not impose sentence or penalty upon this Defendant for both Deliberate Homicide and Aggravated Kidnapping, both offenses having arisen from the same transaction and each of said offenses being established by proof of the same or less than all the facts required to establish the other and that for the Court to impose sentence or penalty upon both Deliberate Homicide and Aggravated Kidnapping would constitute a violation of 95-1711 R:C.M. 1947;

6. It is generally understood that any person has the right to present matters in mitigation of sentence;

7. The Court herein has advised Defendant that it is receptive to, and will hear, any matter in mitigation;

8. However, the Defendant is at a loss to determine whether what the Court refers to is the mitigation spoken of in

the above described statutes or the mitigation generally allowable in any sentencing (unless of course the Court is without discretion in the setting or imposition of sentence);

9. The Court is surely aware of the mitigating circumstances relating to the Defendant's mental condition. Defendant had a well-recognized and qualified psychiatrist testify to the effect that Defendant so suffered from mental disease or defect that he could not have had the requisite intent and that such disease or defect should exclude responsibility. (The jury, however, did not find such mental disease or defect; however, Defendant asserts that the statutory method of presenting such concept to the jury precluded such finding and the Court's refusal to apprise the jury as to disposition of Defendant if such verdict were returned left them with the dilemma of either convicting Defendant or perhaps immediately turning him loose upon society since they were not informed as to the mandatory disposition after verdict of not guilty by reason of mental defect or disease excluding responsibility; that both psychiatrists and the psychologist all testified that Defendant certainly suffered from a "personality disorder" and that he was dangerous; the only difference of opinion was to the degree of such personality disorder; and that the Court should consider such proof presented by both the prosecution and the defense and the lack of proper instruction as a mitigating circumstance in imposing sentence;

10. The Court should further take into consideration that Defendant is but 23 years old; that he left his mother at age 12 and went to live with his itinerant ranch-worker father; that he has no friends or roots; that he is an indigent stranger to the Conrad and Great Falls communities and was and is unable to provide any character witnesses at trial or now; that he has a wife and three (3) children in the Chinook, Montana community and that society would benefit by returning him to them after

corrective medical treatment more than it would for punishing him for the sins society has done against him;

11. That the Eighth Amendment to the U. S. Constitution and Section 22 of Article II of the 1972 Montana Constitution prohibits cruel and unusual punishments; that no death penalty has been imposed and inflicted in Montana in over thirty years; that to impose such a penalty in this cause (where discretion is allowed) would be an abuse of that discretion and such would be the imposition of cruel and unusual punishment;

12. That the new 1972 Montana Constitution states in Section 28, Article II as follows:

"Laws for the punishment of crime shall be founded on the principles of prevention and reformation....";

That to impose a sentence of death would be in direct conflict with the mandate of this Constitutional provision; that the sentence of death is unconstitutionally violative of the above quoted Section of the Montana Constitution of 1972;

13. That this Court has heretofore entered into a plea bargaining agreement with counsel for the State and the Defendant on December 23, 1974; that although the Court has refused to specifically enforce said agreement of December 23, 1974, it has yet not broken it; that the Court therein promised Defendant that it would not impose a sentence in excess of fifty (50) years; that the U.S. Supreme Court has held that such agreements must be enforced in Santobello v. New York, 404 U.S. 257, 30 L.Ed. 2d 427, 92 S. Ct. 495; that the information obtained from the defense by the prosecution, and fully taken advantage of, by the prosecution, may well be the real basis for the jury's verdict in this cause; that the Court's sense of justice and fair play must well be involved by the action of the prosecution repudiating, and fully taking advantage of the unfair position obtained under the agreement all made and entered into on December 23, 1974;

WHEREFORE, Defendant prays the Court as follows:

1. To sentence upon a single verdict only and not upon both verdicts;

2. To disregard the special interrogatory answers given by the jury as verdicts which the jury was not entit to decide and as contrary to both the law and the facts in evidence;

3. To find mitigating circumstances and to impose a mitigated penalty because of such finding;

4. To not impose a sentence of death; and

5. To impose a sentence not to exceed fifty (50) yea

DATED thi 25th day of February, 1975.

BARNEY REAGAN
CHAS. L. JACOBSON
Attorneys for Defendant

By: Barney Reagan

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PONDERA

* *

STATE OF MONTANA, Plaintiff, vs. DUNCAN PEDER McKENZIE, JR., Defendant.

Cr. No. 709

AMENDED INFORMATION

* *

At a term of the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Pondera, at Conrad, the County Seat of said County, DAVID H. NELSON, County Attorney of said County of Pondera, now here in Court, upon leave granted by this Honorable R. J. NELSON, presiding Judge in the above entitled matter, and upon belief and information makes that DUNCAN PEDER McKENZIE, JR., late of the County of Pondera, on or about the 21st day of January, A. D. 1974, at the County of Pondera, in the State of Montana, committed the following crimes in the following Counts all at locations in Pondera County, Montana, said Counts being pursuant to the Montana Criminal Code of 1973, which is Title 94 of the Revised Codes of Montana 1947, as amended, to-wit:

COUNT 1: That DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being;

and section 94-5-103

in violation of Section 94-5-101, R.C.M. 1947.

DEC 6 [illegible]

IN [illegible] COUNTY

Clerk

COUNT 2: That DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by causing the death of LANA HARDING, a human being, while the said DUNCAN PEDER McKENZIE, JR. was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit:

1. SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with the said LANA HARDING, a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, Jr being a male person; or

2. AGGRAVATED ASSAULT, a felony involving the use or threat of physical force or violence against the said LANA HARDING, by purposely or knowingly causing:

   a. serious bodily injury to the said LANA HARDING; or

   b. bodily injury to the said LANA HARDING with a weapon, namely:

      1. a rope, by placing said rope around the neck of the said LANA HARDING; or

      2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object; or

that the said DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, as above alleged, by causing the death of the said LANA HARDING:

1. by mean of torture; or

2. by lying in wait or ambush;

in violation of Section 94-5-101, 94-5-102, 94-5-103 and 94-5-202, R.C.M. 1947.

COUNT 3: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED KIDNAPPING, a felony, by knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force with the purpose of facilitating the commission, or flight thereafter, of the felony:

1. SEXUAL INTERCOURSE WITHOUT CONSENT, by knowingly having sexual intercourse with the said LANA HARDING a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, JR. being a male person; or

2. AGGRAVATED ASSAULT, by purposely or knowingly causing:

a. serious bodily injury to the said LANA HARDING; or

b. bodily injury to the said LANA HARDING with a weapon, namely:

1. a rope, by placing said rope around the neck of the said LANA HARDING; or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Sections 94-5-303, 94-5-503 and 94-5-202, R.C.M., 1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 4: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED KIDNAPPING, a felony, by knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force, with the purpose of inflicting bodily injury on the said LANA HARDING or terrorizing the said LANA HARDING, in violation of Section 94-5-303, R.C.M. 1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 5: That DUNCAN PEDER McKENZIE, JR., a male person, committed the crime of SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with LANA HARDING, a female not his spouse, without consent, in violation of Section 94-5-503, R.C.M. 1947.

COUNT 6: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing serious bodily injury to LANA HARDING, in violation of Section 94-5-202, R.C.M., 1947.

COUNT 7: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing bodily injury to LANA HARDING with a weapon, namely:

1. a rope, by placing said rope around the neck of the said LANA HARDING; or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Section 94-5-202, R.C.M. 1947.

contrary to the form, force and effect of the statutes in such case made and provided above, and against the peace and dignity of the State of Montana.

David H. Nelson
County Attorney, Pondera County,
State of Montana

STATE OF MONTANA)
: ss.
County of Pondera)

DAVID H. NELSON, being first duly sworn, says that he, said affiant, is the County Attorney of Pondera County, Montana, and on information and belief says that the facts stated in the foregoing information consists of four (4) pages are true and that the Defendant therein named is guilty of the offense charged as therein set forth.

David H. Nelson

SUBSCRIBED AND SWORN to before me this 3rd day of September, A.D., 1974.

SEAL

Clerk

by:
Deputy Clerk

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

STATE OF MONTANA, Plaintiff, vs. DUNCAN PEDER McKENZIE, JR., Defendant.

Criminal Action No. 4534

AFFIDAVIT

STATE OF MONTANA)
:ss
County of Pondera)

DEC 30 1974
FLORENCE McCARTHY
Clerk of Court

BARNEY REAGAN, after being duly sworn upon his oath, deposes and says:

That he is one of the attorneys appointed and acting on behalf of DUNCAN PEDER McKENZIE, JR., Defendant herein;

That on or about the 9th day of December, 1974, Defendant authorized your affiant, together with co-counsel, CHAS. L. JACOBSON, to enter into meaningful negotiations with the representatives of the State of Montana for the purpose of plea bargaining in the above entitled action;

That subsequent to that date various offers, feelers or suggestions concerning plea bargaining were presented to the Pondera County Attorney; however, at each such attempt said County Attorney left your affiant with the impression that he either did not appreciate the nature of your affiant's effort or that he would have to secure the advice of the Special Prosecutor (who is also the County Attorney elect, having defeated the County Attorney in the November election);

That as of December 27th, 1974, your affiant had not received any direct response from his "offers, feelers and suggestions" either from the County Attorney or the Special Prosecutor; that on said date your affiant came into personal contact with the Special Prosecutor, and directly presented the matter of the De-

fendant's willingness to enter into a bargaining situation whereby the Defendant would enter a plea of guilty as to some specific allegations contained in the Information in return for a pre-determined and agreed-upon sentence;

Such negotiations proceeded, now with the efforts and attendance of both counsel for Defendant and both counsel (County Attorney and Special Prosecutor) for the State; on the morning of December 22nd, 1974, (Sunday) it was mutually agreed by all representatives of the prosecution and Defendant that the Defendant would enter a plea of Guilty to portions of the allegations contained in Counts II and VII; that said plea would have the effect of pleading Guilty to Deliberate Homicide while in the commission of a felony, to-wit: Aggravated Assault with a heavy weapon, and Guilty to Aggravated Assault while in the commission of bodily injury upon the deceased with a weapon, to-wit: namely, a rope; and that Defendant would receive a sentence of fifty (50) years and twenty (20) years respectively; both sentences to run concurrently and not consecutively; all parties agreed and understood that this agreement would not be binding upon, and would be subject to the approval of the presiding Judge in this cause;

The Special Prosecution expressed fears concerning public reaction to this effort, and most expressly was worried over the reaction of the Sheriff of Pondera County and the family of the deceased;

It was the Special Prosecutor's avowed initial intention to present all of this to the said Sheriff and family of the deceased before making our mutual presentation to the Court; it was the apparent understanding of all concerned, and especially this affiant, that if the Prosecution could not secure the approval of said Sheriff and the family of the deceased, that there would probably not be any necessity of presenting the situation to the Court;

Your affiant then advised the Prosecutor that he was privy to certain information, that would be used at trial, that could be used to demonstrate to the Sheriff that his efforts had put the Prosecution into such a position that it was in their best interest to proceed in this manner; such information was not provided the State at this time; and it was understood that such would be provided upon a committment by the Court;

The Prosecution then deemed it more expedient to approach the Court with this situation prior to any other consultation; that it was never the intention of your affiant, or his co-counsel to ever allow the Sheriff of Pondera County or the family of the deceased, to have the power of "veto" over the negotiations then taking place, but that since contact with them would be made prior to our mutual approach to the Court, no harm to Defendant would be done; however, your affiant's attitude as it related to their being consulted after the mutual contact with the Court was opposite.....if the Court refused to accept the plea bargain, the matter would be halted, or if the Court accepted the offer, the Prosecution's contact with the Sheriff and family of the deceased would be for the purpose of pro forma consultation for the purpose of courtesy and to attempt to reduce the possibility of these parties causing adverse public opinion within Pondera County against either the County Attorney or the Special Prosecutor.

On Monday, December 23rd, 1974, all counsel in this matter met with the Honorable R. J. Nelson in his chambers in Great Falls for approximately three (3) hours; although the Court expressed a dislike for the entire affair, and especially the length of sentence agreed upon, the Court agreed to allow the plea and give the sentence agreed upon (although the Court felt it could only give the fifty (50) year sentence for both offenses; that was mutually understood and agreed upon).

The Court then ordered all parties, including Defendant to

appear on Monday, December 30, 1974; to appear and at this time Defendant would withdraw his plea and enter his new plea as per our mutual understanding.

Subsequent to this meeting with the Court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influencing of public opinion by the Sheriff of Pondera County, your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreement heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the Prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury, and where certain assumptions being made by the Sheriff and Prosecution were fallacious;

That your affiant and co-counsel left this meeting with the complete and unequivocal understanding that a final and complete bargain had been struck by all parties including the Court; that counsel for the Prosecution were then going to apprise the family of the deceased and the Sheriff of Pondera County of this agreed upon situation;

That on Saturday, December 28, 1974, at approximately 3:00 o'clock P. M., the Special Prosecutor advised your affiant that he had travelled, together with the County Attorney, to Polson, Montana, and had contacted the family of the deceased (Hardings) and their attorney, Senator Jean Turnage; that Mr. Harding was irascible to the point of threatening violence upon the Defendant and his counsel, and that they were adamant that no such understanding should be allowed to proceed; and that the Special Prosecution then proceeded to rationalize his refusal to proceed

in accordance with the agreement already made; that as part of such rationalization, the Special Prosecutor complained that Defendant could have backed out of the deal at any time prior to sentencing; that your affiant agreed that such were possible, but for Defendant to do so he would have to do so pro se and that his counsel would have had a duty to make every effort to withdraw as counsel of record, and that any resulting delay in trial would have been caused by Defendant;

That your affiant believes, and has reason to believe, that in spite of the "Gag Order" heretofore filed in this cause, counsel for the Prosecution has not only discussed this matter with the heretofore mentioned Hardings, but has also been in direct contact with two other District Judges seeking their advice and counsel;

That your affiant believes, and has reason to believe, that the counsel for the State, both County Attorney and Special Prosecutor, have misled counsel for Defendant, violated, or are attempting to violate, the rights of Defendant, and have engaged in unethical conduct in violation of the Canons of Professional Ethics and the Code of Professional Responsibility (See Canons 5,6,7,8,9,15,16,22,24,25,31,32,35, and 41 of the Canons of Professional Ethics).

That your affiant believes,and has reason to believe, that he has a duty to the Court, his client, and counsel for the Prosecution to bring this entire matter before, and to lay it exposed to, this Honorable Court in the interests of justice and fair play to both the State and the Defendant.

Further your affiant sayeth not.

DONE this 30th day of December, 1974.

BARNEY REGAN

SUBSCRIBED AND SWORN to before me this 30th day of December, 1974.

(SEAL)

Notary Public for the State of Mon
Residing at Conrad, Montana
My Commission expires Aug. 25, 197